

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 2032

INTRODUCER: Governmental Oversight and Accountability Committee and Commerce Committee

SUBJECT: OGSR/Scripps Florida Funding Corporation public records and meetings

DATE: April 21, 2009

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Pugh</u>	<u>Cooper</u>	<u>CM</u>	Favorable
2.	<u>Naf</u>	<u>Wilson</u>	<u>GO</u>	Fav/CS
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill is the result of a public records and meetings exemptions review under the Open Government Sunset Review Act.¹

In a 2003 special session, the Legislature created the Scripps Florida Funding Corporation (corporation), a nine-member, not-for-profit board that is responsible for: monitoring its 20-year agreement with The Scripps Research Institute (TSRI) for the establishment of a state-of-the-art biomedical research facility in Florida; and disbursing state funds on a schedule that coincides with the Florida facility meeting job-creation targets and other specified performance requirements. The Scripps Florida facility (Scripps Florida) is engaged in a variety of biomedical research.

The Legislature also created section 288.9551, F.S., which provides that certain information held by the Scripps Florida Funding Corporation (corporation) or by the Office of Tourism, Trade, and Economic Development (OTTED) is confidential and exempt from the requirements of s. 119.07(1), F.S. and s. 24, Art. I of the State Constitution. The section further provides a public

¹ See s. 119.15, F.S.

meetings exemption from those portions of meetings of the board of directors of the corporation or the OTTED at which such confidential and exempt information is discussed.

This bill reenacts the exemptions.

This bill amends the definition of “grantee” to include a provision in current law that declares that TSRI and Scripps Florida are not subject to the public records and open meetings requirements.

This bill narrows the public records and public meetings exemptions by removing the OTTED because the same information is protected by a duplicative exemption for economic incentive programs. In addition, the OTTED has indicated that it does not hold closed meetings pursuant to this public meetings exemption.

This bill makes conforming changes, removes superfluous language, and reorganizes the section.

Finally, this bill extends the repeal date from October 2, 2009, to October 2, 2014.

This bill does not expand the scope of the exemptions and therefore does not require a two-thirds vote of each house of the Legislature for passage.

This bill substantially amends s. 288.9551, F.S.

II. Present Situation:

Florida’s Public Records Law

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), Art. I, of the State Constitution, provides that:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides

that every person who has custody of a public record² must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency³ records are to be available for public inspection.

Section 119.011(12), F.S., defines the term “public record” to include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are “intended to perpetuate, communicate, or formalize knowledge.”⁴ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption⁸ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.⁹

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹⁰ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹¹

Open Government Sunset Review Act (s. 119.15, F.S.)

² s. 119.011(1), F.S., defines “public record” to include “all documents, papers, letters, maps, books, tapes, photographs, film, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.”

³ s. 119.011(2), F.S., defines “agency” as “...any state, county, district, authority, or municipal officer, department, division, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁴ *Shevin v. Byron, Harless, Shafer, Reid, and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁵ *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)

⁶ Article I, s. 24(c) of the State Constitution.

⁷ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁸ s. 119.15, F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁹ Article I, s. 24(c) of the State Constitution

¹⁰ Attorney General Opinion 85-62, August 1, 1985.

¹¹ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

The Open Government Sunset Review Act (act) establishes a review and repeal process for public records exemptions. In the fifth year after enactment of a new exemption or in the fifth year after substantial amendment of an existing exemption, the exemption is repealed on October 2, unless reenacted by the Legislature. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created, expanded, or maintained only if: (1) it serves an identifiable public purpose; and (2) if it is not broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three statutory purposes and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory purposes are:

- If the exemption allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- If the exemption protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals.
- If the exemption protects information of a confidential nature concerning entities, including but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The Scripps Florida Funding Corporation

In a 2003 special session, the Legislature created the Scripps Florida Funding Corporation (corporation), a nine-member, not-for-profit board that is responsible for:

- Monitoring its 20-year agreement with The Scripps Research Institute¹² (TSRI) for the establishment of a state-of-the-art biomedical research facility in Florida; and
- Disbursing state funds on a schedule that coincides with the Florida facility meeting job-creation targets and other specified performance requirements.

The corporation is not a unit or entity of the state, but is subject to Florida's public records and open meetings laws.¹³

As a companion measure, the Legislature also appropriated \$310 million to the project; the source of the money was federal economic stimulus funds provided to Florida under the Jobs and Growth Tax Reconciliation Act of 2003 that had been deposited into the state's General Revenue

¹² The Scripps Research Institute is based in La Jolla, California.

¹³ Section 288.955(2)(b), F.S.

Fund. At least \$230 million was additionally contributed by Palm Beach County and other entities.

The state funds are being disbursed over a 10-year-period, which began in 2004. Undisbursed funds are being invested by the State Board of Administration, and the interest earnings go to TSRI's Florida facility (Scripps Florida).

As of November 2008, the corporation had disbursed \$189.3 million, plus \$14.5 million in interest earnings, to TSRI.¹⁴ As of September 2008, TSRI's Florida facility had 262 employees;¹⁵ under the terms of its agreement with the corporation, the Florida facility is required to hire 545 employees by 2014.

The Scripps Florida Facility

The Florida facility is engaged in a variety of biomedical research, ranging from Alzheimer's disease, to estrogen-dependent disorders, hepatitis, and neurodegenerative diseases. Its technological discoveries have facilitated the creation of two spin-off companies, Xcovery and cuRNA.¹⁶

The Florida facility is not an independent research institute, separate from the La Jolla, California-based TSRI. Rather, the Florida facility is a division of TSRI. The state's funds are spent only on approved expenditures at the Florida facility. Even though it receives public funds, TSRI (and by extension, Scripps Florida) is a private, not-for-profit research institute, and is not subject to Florida's public records and open meetings laws.

Public Records and Public Meetings Exemptions Under Review

In concert with the appropriation and creation of the corporation in 2003, the Legislature also enacted s. 288.9551, F.S., which provides public records and public meetings exemptions for the corporation and for the OTTED.¹⁷

The following information is confidential and exempt from public records requirements:

- Materials that relate to methods of manufacture or production, potential trade secrets, patentable material, actual trade secrets,¹⁸ or proprietary information received, generated, ascertained, or discovered by or through the grantee or TSRI.
- Agreements and proposals to receive funding, including grant applications.¹⁹ However, those portions of such agreements and proposals to receive funding, including grant applications,

¹⁴ Email from Jenni Garrison, OTTED's Innovation Program Manager, sent Nov. 24, 2008. On file with the Senate Commerce Committee.

¹⁵ Ibid.

¹⁶ Power Point Presentation on the Scripps Florida facility, presented by Carol Licko, on Jan. 14, 2009, before the Senate Commerce Committee. On file with the committee.

¹⁷ Chapter 2003-419, L.O.F.

¹⁸ Section 688.002(4), F.S., defines "trade secret" to mean information, including a formula, pattern, compilation, program, device, method, technique, or process that: derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

that do not contain information otherwise exempt, shall not be confidential and exempt upon issuance of the report that is made after the conclusion of the project for which funding was provided. Excluded from this exemption is the agreement between the corporation and TSRI that governs the release of the state funds.

- Materials that relate to the recruitment of scientists and researchers.
- Materials that relate to the identity of donors or potential donors.
- Any information received from a person or another state or nation or the Federal Government, which is otherwise confidential or exempt pursuant to that state's or nation's laws or pursuant to federal law.
- Personal identifying information of individuals who participate in human trials or experiments.
- Any medical or health records relating to participants in clinical trials.

In addition, those portions of board meetings by the corporation's directors or by OTTED, during which exempt and confidential information is presented or discussed, are exempt from open meetings requirements.²⁰ Records generated during those closed meetings (including meeting minutes and recordings) are confidential and exempt from public records requirements.²¹

Public employees are permitted to inspect and copy the confidential and exempt records in the furtherance of their duties and responsibilities. Any public employee violating the exemption commits a misdemeanor of the first degree, punishable by a maximum of one year in jail and a \$1,000 fine.²² This is a stronger penalty than that provided in the general public records exemption for other economic programs.²³

Finally, the statute declares that TSRI and Scripps Florida are private, not-for-profit entities and, as such, are not subject to the public records and open meetings requirements.²⁴ The section, however, provides the same exemptions for TSRI and Scripps Florida just in case a court determines the facilities are acting on behalf of an agency. Such provision is not common for public records and public meetings exemptions.

The constitutionally required "public necessity statement" accompanying the creation of the exemptions asserted a number of reasons supporting the confidentiality of certain information that TSRI and its Florida facility could provide the corporation or OTTED.²⁵ For example:

- The state is making a substantial financial investment in the TSRI project.
- Disclosure of certain TSRI information and records could create an unfair competitive advantage for persons receiving the information, in turn putting TSRI at a competitive

¹⁹ Those portions of agreements and proposals to receive funding, including grant applications, that do not contain information otherwise exempt, shall not be confidential and exempt upon issuance of the report that is made after the conclusion of the project for which funding was provided. Excluded from this exemption is the agreement between the corporation and TSRI that governs the release of the state funds.

²⁰ Section 288.9551(3), F.S.

²¹ Section 288.9551(4), F.S.

²² Section 288.9551(5), F.S.

²³ Any employee who violates the exemption for economic incentive programs provided in s. 288.075, F.S., commits a misdemeanor of the second degree.

²⁴ Section 288.9551(6), F.S.

²⁵ Section 2 of ch. 2003-419, L.O.F.

disadvantage, and negatively impact anticipated benefits to the state, its economy, and its academic community.

- Specifically, disclosure of grant applications and proposals could put TSRI at a competitive disadvantage for receiving research funds; disclosure of materials related to staff recruitment could allow competitors to outbid TSRI for scientists and researchers; and failure to protect the identities of donors and potential donors could reduce private contributions to TSRI.

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2009, unless reenacted by the Legislature.

III. Effect of Proposed Changes:

The bill amends the definition of “grantee” in s. 288.955, F.S., by relocating and including the provision declaring that TSRI and Scripps Florida are not subject to the public records and open meetings requirements. Under the bill, “grantee” means:

The Scripps Research Institute, a not-for-profit public benefit corporation, or a division, subsidiary, affiliate, or entity formed by The Scripps Research Institute to establish a state-of-the-art biomedical research institution and campus in this state. *The grantee is neither an agency nor an entity acting on behalf of an agency for purposes of chapter 119 and s. 286.011.*²⁶

The bill narrows the public records and public meetings exemptions by removing the OTTED. In its questionnaire response to House and Senate staff, the OTTED noted that it does not receive any of the confidential and exempt information from TSRI or Scripps Florida²⁷ and that it does not hold closed meetings to discuss such information.²⁸ The OTTED also indicated that the exemptions under review were duplicative of the public records exemption provided in s. 288.075, F.S.²⁹ Section 288.075, F.S., provides a general public records exemption for economic development agencies with custody of similar proprietary information received from businesses as a result of administering economic incentive programs. The OTTED is defined as an economic development agency for purposes of that exemption; however, the corporation is not included in the definition.³⁰

The bill maintains the public records and public meetings exemptions for the corporation; however, it should be noted that the corporation indicated to House and Senate staff in its questionnaire response that it does not receive the confidential and exempt information,³¹ nor does it hold closed meetings to discuss such information.³²

²⁶ The new language is italicized.

²⁷ The OTTED’s response to the joint House and Senate questionnaire regarding the open government sunset review of s. 288.9551, F.S.; response completed by Jenni Garrison, Innovation Program Manager for the OTTED, Chris Sullivan, Chairman for the corporation, and Kathy Deutsch, outside counsel for the corporation; received July 30, 2008, at question 6. This response was reiterated during a conference call on August 25, 2008, from 1:00pm – 3:00pm, with representatives from TSRI, Scripps Florida, and the OTTED. The corporation was unable to participate.

²⁸ *Id.* At question 8.

²⁹ *Id.* At question 4.

³⁰ See s. 288.075(1)(a), F.S.

³¹ The OTTED’s response to the joint House and Senate questionnaire regarding the open government sunset review of s. 288.9551, F.S.; response completed by Jenni Garrison, Innovation Program Manager for the OTTED, Chris Sullivan,

The bill conforms the public records exemption for information that identifies a donor or potential donor to that of other similar exemptions. The bill requires a donor or potential donor to indicate a desire to remain anonymous in order to trigger the public records exemption.

The bill conforms the penalty provision to that provided in the general exemption for economic incentive programs. The penalty is reduced from a first degree misdemeanor to a second degree misdemeanor.

The bill makes other conforming changes, removes superfluous language, and reorganizes the section.

The bill extends the repeal date from October 2, 2009, to October 2, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill retains existing public records and public meetings exemptions. This bill complies with the requirement of s. 24, Art. I of the State Constitution that public records exemptions be addressed in legislation separate from substantive law changes.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

Chairman for the corporation, and Kathy Deutsch, outside counsel for the corporation; received July 30, 2008, at question 6. This response was reiterated during a conference call on August 25, 2008, from 1:00pm – 3:00pm, with representatives from TSRI, Scripps Florida, and the OTTED. The corporation was unable to participate. When asked whether the corporation received proprietary information, it responded with the following:

The outside auditors for TSRI provide the outside auditor of the SFFC with highly proprietary and confidential work product during their audit of TSRI and Scripps Florida. SFFC does not directly receive this information. (question 6.e.)

³² *Id.* at question 12.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on April 21, 2009:

The committee substitute amends the definition of “grantee” and narrows the public records and public meetings exemptions by removing the OTTED. The committee substitute makes conforming changes, removes superfluous language, and reorganizes the section. Finally, the committee substitute extends the repeal date for the exemptions from October 2, 2009 to October 2, 2014.

B. Amendments:

None.